**2007 BNH 026 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

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**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF NEW HAMPSHIRE**

In re: Bk. No. 03-12461-MWV
Chapter 13

Donald Louis Wyatt,
Debtor

*Donald Louis Wyatt,*
*Pro se*

*Terrie Harman, Esq.*
*Attorney for Trustee of the*
*Bankruptcy Estate of Michel Roland Brault*

## MEMORANDUM OPINION

The Trustee for the bankruptcy estate of Michel Roland Brault (the "Trustee") has filed a motion for relief from the automatic stay for the purpose of pursuing claims against Donald Wyatt (the "Debtor"), in name only, in order to collect insurance proceeds, if any. The Debtor filed an objection, and the Trustee responded to that objection. A hearing was held July 17, 2007, at which the parties were heard and the Court took the matter under advisement. For the reasons set forth below, the Trustee's motion is granted for the limited purpose of determining the existence and extent of any insurance coverage.

## JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## BACKGROUND

The Trustee is the trustee of the estate of Michel Roland Brault, who was the conservator of David E. Stacy's conservatorship. The Debtor is an attorney who was hired by Brault to represent Brault, Stacy, and the conservatorship. Stacy won a judgment for almost $1 million in probate court against Brault for numerable breaches of Brault's fiduciary duties. Although the Debtor was not a party to the probate proceedings, the probate court implicated the Debtor throughout its lengthy and detailed opinion, and even found him and Brault jointly liable with regard to $191,083.82 of the judgment. The Debtor filed a Chapter 13 petition on July 16, 2003, scheduling Brault as holding a contingent, unliquidated, and disputed unsecured claim. Brault did not file a proof of claim in the Debtor's bankruptcy case. Brault filed a Chapter 11 petition on October 14, 2005, and converted to Chapter 7 within days. Brault scheduled the Debtor as a co-debtor on the debt owed Stacy.

## DISCUSSION

The Trustee seeks relief from the automatic stay in order to recover any insurance proceeds that may cover the claims of Brault's bankruptcy estate. The Trustee is not attempting to find the Debtor personally liable, but to pursue claims against him in name only. The Debtor vigorously objects to the Trustee's motion, and the Court addresses his specific objections as follows.

The Debtor argues that the Trustee has no standing to file a motion for relief from the automatic stay because the Trustee did not file a proof of claim in his bankruptcy case. The Court disagrees that the Trustee's failure to file a timely proof of claim bars the Trustee from obtaining relief from the stay to pursue insurance proceeds. The Court agrees with the Seventh Circuit's analysis in a factually similar case, In the Matter of Fernstrom Storage & Van Co., 938 F.2d 731, 734 (7th Cir. 1991). In Fernstrom, the court granted relief from the stay to allow a creditor to continue litigation against the debtor's insurance company. In rejecting the same argument presented by the Debtor, the court explained as follows:

> "The purpose of the proof of claim is to alert the court, trustee, and other creditors, as well as the debtor, to claims against the estate." In re Daystar of California, 122 B.R. 406, 408 (Bankr. C.D. Cal. 1990); In re Stern, 70 B.R. 472, 476 (Bankr. E.D. Pa. 1987). By providing creditors with a limited time period in which to assert their claims, the Bankruptcy Code and Rules enable the various participants in a bankruptcy proceeding to determine the amount and nature of claims against the estate, information essential to the distribution of the estate's assets or the formulation of an equitable plan of reorganization. As in Turner and Jet Florida, in this case the creditor holding the claim for which no proof was filed has agreed that all it will seek from the debtor is a determination of liability. This determination will neither deplete the debtor's assets or otherwise interfere with the administration of the bankruptcy proceeding, nor hinder the debtor's fresh start at the close of the proceeding. Rather, it will operate only as "a prerequisite to recovery against another entity." In Re Walker, 927 F.2d 1138, 1142 (10th Cir. 1991). In such a situation, the notice function served by the rule that only proven claims will be allowed to share in the distribution is not frustrated by allowing a creditor that has not filed a proof of claim to proceed against the debtor.

Id. The Court is persuaded by the Fernstrom court's reasoning and concludes that the Trustee's motion is not barred because the Trustee has not filed a proof of claim.

The Court is likewise convinced that the three-part balancing test adopted in Fernstrom is applicable to this case in order to determine whether "cause" exists to grant relief from the stay under 11 U.S.C. § 362(d). The test considers whether

> a) Any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit,
>
> b) the hardship to the [non-bankrupt party] by maintenance of the stay considerably outweighs the hardship of the debtor, and
>
> c) the creditor has a probability of prevailing on the merits.

Id. at 735.

The Debtor argues that the motion for relief should be denied and application of the Fernstrom test is inappropriate because the Trustee is not seeking to *continue* an ongoing lawsuit but rather to *commence* a lawsuit. The Court disagrees that the stage of the lawsuit is dispositive on the issue of whether relief from the stay is available, but rather the stage of the lawsuit is a factor to be considered in

the balancing test to determine if relief from the stay is appropriate. See id. at 736–37 (generally, the further along the litigation, the greater the prejudice to the non-bankrupt party if the stay is not lifted); see also In re Montgomery, 285 B.R. 345, 346 (Bankr. D.R.I. 2002) (describing the Fernstrom test as a tool "to determine if cause exists to lift the stay and allow a creditor to commence or maintain" an action).

The Court also disagrees with the Debtor's argument that Fernstrom, a Chapter 11 case, is inapplicable to Chapter 13 cases because the Trustee's lawsuit would frustrate his successful reorganization. Any prejudice to the Debtor will be considered in performing the balancing test. He also argues that this case is distinguishable from another case cited by the Trustee for support, Penney v. Town of Middleton, 888 F. Supp. 332 (D.N.H. 1994). Penney is a post-discharge case, and the court stated that a bankruptcy discharge does not prevent a creditor from naming a debtor in a suit to recover from the debtor's insurers. Id. at 342. The Debtor points out that he has yet to receive a discharge. However, this distinction is not material, and any frustration of reorganization or other prejudice to the Debtor will be considered in performing the balancing test.

Having determined that relief from the stay may be appropriate after application of the Fernstrom test, the Court concludes that before it is able to make the ultimate determination of whether relief should be granted, it must know whether there is any insurance coverage to pursue, and, if so, the extent of that coverage. In re Metro Transp. Co., 82 B.R. 351, 353–54 (Bankr. E.D. Pa. 1988). The Debtor asserts that no insurance coverage exists, and the Trustee has not provided any proof of coverage. The Court, therefore, grants relief from the automatic stay pursuant to 11 U.S.C. § 362(d) for the limited purpose of determining the existence and extent of any insurance coverage.

## CONCLUSION

The Court declines to rule on the full extent of the Trustee's motion for relief at this time. Relief from the automatic stay is granted only to the extent described above. The hearing scheduled for July 24, 2007, is cancelled. This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 20th day of July, 2007, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge